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SUPREME COURT, U.S.

No. 07-606

In The
Supreme Court of the United States

JOHN CARLO, INC.,

Petitioner,

v.

SECRETARY OF LABOR,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

The Secretary concedes there is a circuit split on the issue of whether a supervisor's knowledge of his own misconduct is imputed to the employer as a matter of law. Res. 12, n.4. In fact, the Secretary concedes that she has sought review of that very issue, and acknowledges its importance. Res. 12-13. The Secretary nevertheless opposes review on the ground that this case is not suitable for resolving the important conflict it presents.

In truth, this is an ideal case for resolving the circuit split over the issue of imputation of supervisory misconduct. The Petitioner/employer has been punished based on the actions of two supervisors. The supervisors had spotless safety records. No similar violations had previously occurred at any of the employer's work projects. Had the supervisors followed the employer's safety rules, there would have been no loss of life. Pet. App. 9, 14, 17-23. Yet despite Congress' intention to create a fault-based rather than strict liability scheme under the Act, the Eleventh Circuit held the supervisors' knowledge of their misconduct is imputed to Petitioner without regard to the foreseeability of that misconduct. If there are any limits to the Secretary's ability to impute a supervisor's knowledge of his own misconduct to an employer, this is the case to announce those limits.

A. Petitioner presented the issue of imputed supervisory knowledge at all stages, and the issue is preserved for review.

The Secretary argues that Petitioner failed to convey to the Commission the "crux" of the issue on review. Res. 15. In particular, the Secretary contends that Petitioner did not argue that the Act prohibits knowledge imputation in supervisory misconduct cases. Res. 14. The Secretary's preservation argument is mistaken. It is based on an incomplete recitation of what Petitioner actually argued in the Commission.

The Secretary states that Petitioner "acknowledged" that a supervisor's knowledge can be imputed to the employer to provide a violation of the Act. Res. 14-15. But the Secretary fails to quote the entire argument Petitioner made in the Petition for Discretionary Review ("PDR") that it filed with the Commission, which states:

> First, as a matter of law, Complainant has the burden of proving that JCI had actual or constructive knowledge of the unsafe trench. When a supervisory employee has actual or constructive knowledge of the violative condition, the knowledge of that employee can be imputed to the employer. However, the employer can rebut that imputed knowledge by showing that the employer "took reasonable measures to prevent the occurrence of the violation." *Where the employer undertook reasonable efforts to prevent the violation, the knowledge of a supervisor engaged in misconduct is not attributable to the employer,*

> *because to do so creates an absolute liability situation that is not intended by the Act.*

Supp. C.A. R.E. tab 8 at 3-4 (emphasis added) (citations omitted).

Petitioner's full argument is perfectly consistent with the point Petitioner makes here – that the Secretary cannot establish a violation of the Act by imputing a supervisor's knowledge of his own misconduct when the employer could not foresee that violation.[1] As the above-quoted passage points out, if a fault-based foreseeability rule is not imposed and the Secretary's knowledge imputation approach is followed, the result is "an absolute liability situation that is not intended by the Act." Supp. C.A. R.E. tab 8 at 3-4.[2]

The Secretary also contends Petitioner "did not argue" that imputation of supervisory knowledge "impermissibly shifts the burden of proof." Res. 14. The Secretary is incorrect. Petitioner's argument that knowledge imputation "creates [] absolute liability," Supp. C.A. R.E. tab 8 at 3, undeniably encompasses

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[1] In support of that argument, Petitioner's PDR cited *Horne Plumbing & Heating Co. v. OSHRC*, 528 F.2d 564 (5th Cir. 1976), the same circuit court opinion upon which Petitioner primarily relied in the Eleventh Circuit.

[2] Petitioner's PDR addressed foreseeability and the unpreventable employee misconduct defense in two separate sections. Supp. C.A. R.E. tab 8 at Part II and Part IV. The above-quoted excerpt comes from the section that addressed the requirement of foreseeability in the Secretary's prima facie case.

the argument that knowledge imputation shifts the burden of proof – if it does not eliminate the foreseeability element in its entirety. However phrased, the point is the same: When a rogue supervisor's intentional violation of the employer's own safety rules is imputed to the employer, the employer loses the ability to defend itself. Such imputation violates Congress' intention of creating a fault-based rather than strict liability system.

A point is presented for review by the Commission if "called to the attention of the Commission." *P. Gioioso & Sons, Inc. v. OSHRC*, 737 F.3d 100, 105 (1st Cir. 1997); *see also Cleveland Consolidated, Inc. v. OSHRC,* 649 F.2d 1160, 1164-65 (5th Cir. 1981). Petitioner preserved the issue of whether a supervisor's knowledge of his own misconduct is imputed to the employer as a matter of law.

B. Had the Eleventh Circuit applied the better reasoned majority rule, Petitioner would have prevailed.

As the Petition shows, imputing supervisory knowledge relieves the Secretary of its burden of proof. Pet. 11-12. The Secretary argues that the elimination of its burden does not matter. According to the Secretary, "the outcome of the proceeding would have been the same even if the ALJ had required the Secretary to demonstrate that the violation . . . was foreseeable." Res. 19. That is so, the Secretary's argument runs, because the elements of

the affirmative defense of "unpreventable employee misconduct" closely mirror the foreseeability analysis of the prima facie case, and the ALJ found that Petitioner failed to establish that defense. Res. 17-19.

The Secretary again is in error. It made the same losing argument in *W.G. Yates & Sons Constr. Co., Inc. v. OSHRC*, 459 F.3d 604, 610 (5th Cir. 2006) (Reavley, C.J., dissenting). The ALJ's rejection of the unpreventable employee misconduct defense does *not* conclusively establish foreseeability. If the evidence shows the employer "could not with the exercise of *reasonable diligence* [] know of the presence of the violation," then the Secretary has failed to establish the knowledge element of her prima facie case. 29 U.S.C. § 666(k) (emphasis added). Violations of an employer's safety program are not rendered foreseeable "simply because the employer does not have a work rule that tracks the Secretary's interpretation of the governing regulation." *Pennsylvania Power & Light Co. v. OSHRC*, 737 F.2d 350, 358 (3d Cir. 1984). Rather, under Congress' balanced approach and the majority rule, safety programs are "broadly construed," to determine whether the employer has been reasonably diligent. *Id.*; *see also* 29 U.S.C. § 666(k). Even the Commission has "cautioned the Secretary not to 'overemphasize the formal aspects of [a company's] safety program and fail to give proper significance to its substance.'" *Id.* (quoting *Sec'y of Labor v. Jones & Laughlin Steel Corp.*, 10 O.S.H.C. Cas.

(BNA) 1778, 1782 (June 25, 1982).[3] Thus, in the circuits that follow the Act and the majority rule, reasonable diligence will defeat the Secretary's prima facie case. The perfect compliance the Secretary demands is not required. Nor should it be.

In short, "the employer has a far greater chance of prevailing if the Commission analyzes the same facts under the" foreseeability element of the Secretary's prima facie case rather than the employer's unpreventable employee misconduct affirmative defense. Kenneth D. Kleinman and John F. Ward, *The Intersection of Employer and Employee Responsibility: The Burdens of Showing Employer Knowledge and Employee Misconduct*, 7 U. Pa. J. Lab. & Emp. L. 487, 509-10 (2005). *See also id.* at 493-509, n.174. In this case, the ALJ relieved the Secretary of its burden of

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[3] The ALJ acknowledged that Petitioner's "safety manual contains detailed sections" on Petitioner's "Trench Safety Policy," and that "[t]he Secretary stipulated that this safety policy manual was generally adequate as it related to trench safety." Pet. App. 30-31. On remand, the ALJ should be prohibited from again relying on hypertechnical differences between Petitioner's work rules and the Secretary's interpretation of OSHA standards as a basis for establishing foreseeability of the supervisors' misconduct. The slight differences between Petitioner's rules and the Secretary's interpretation of OSHA standards were unrelated to the real cause of the employees' injuries, which was the supervisors' unforeseeable and total disregard of the company's trench safety policy. In other words, the accident in this case was not the result of Petitioner providing a 34-degree slope for the trench instead of a 45-degree slope. Pet. App. 35. It was the result of the supervisors' decision to violate Petitioner's trench safety policy by omitting *all* sloping. Pet. App. 21-23.

proving foreseeability and imposed on Petitioner the burden of proving the affirmative defense. When it did so, the ALJ determined that the adequacy of Petitioner's safety program would be evaluated on a hypertechnical basis, not under the reasonable and broad construction the law requires. The upshot is that the ALJ's failure to address the critical issue of foreseeability in the context of the Secretary's prima facie case before shifting to Petitioner the burden to prove the affirmative defense is harmful error. *See W.G. Yates,* 459 F.3d at 609-10 (remanding so the ALJ could conduct the foreseeability analysis of the prima facie case, even though the ALJ already determined that the employer failed to establish the affirmative defense).[4]

C. The Eleventh Circuit's opinion supplies a rule of decision that the Supreme Court should review and correct.

Without citation of authority, the Secretary argues that the Eleventh Circuit opinion should not be reviewed because it is unpublished. Res. 15-17. The Secretary is wrong. This Court recognizes the prospective effect of unpublished opinions, and has reviewed them. *See, e.g., Baldwin County Welcome Ctr. v. Brown,* 466 U.S. 147 (1984) (summarily reversing the Eleventh Circuit's unpublished opinion in

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[4] The ALJ in the present case is the same ALJ that presided over *W.G. Yates*. Pet. 4 n.1, 19.

Brown v. Baldwin County Welcome Ctr., 698 F.2d 1236 (11th Cir. 1983 – Table of Decisions without Reported Opinions)). As Justice Blackmun explained,

> The fact that the Court of Appeals' opinion is unpublished is irrelevant. Nonpublication must not be a convenient means to prevent review. An unpublished opinion *may have a lingering effect in the Circuit* and surely is as important to the parties as is a published opinion.

Smith v. U.S., 502 U.S. 1017, 1020 n.* (1991) (Blackmun, J., dissenting) (emphasis added).

Left uncorrected, the decision in this case will undeniably have a "lingering effect." Unpublished opinions are persuasive authority in the Eleventh Circuit. *See* 11th Cir. Rule 36-2; *Lanier Constr., Inc. v. Carbone Props. of Mobile, LLC*, 2007 WL 3307384, *3, n.5 (11th Cir. 2007) (vacating and remanding based on an unpublished opinion). Under Rule 32.1 of the Federal Rules of Appellate Procedure, courts may no longer restrict the citation of unpublished opinions that are issued on or after January 1, 2007. *See* Fed. R. App. P. 32.1. The opinion in this case was issued on May 14, 2007. Additionally, unpublished opinions are now widely accessible on court websites and through commercial services like Westlaw and LexisNexis. *See* Anika C. Stucky, *Building Law Not Libraries: The Value of Unpublished Opinions and Their Effect on Precedent*, 59 Okla. L. Rev. 403, 406 (2006).

The decision on review is only the second to adopt the Secretary's position. There is no reason to believe the Secretary will not rely on the Eleventh Circuit's unpublished decision in her continuing efforts to advance her knowledge imputation argument.

The Secretary also asserts that the Eleventh Circuit opinion should not be reviewed because it does not really conflict with the majority rule in that the Eleventh Circuit did not specifically hold that the ALJ's legal analysis was correct. Res. 15-17. That argument is unavailing. The Eleventh Circuit opinion states that the ALJ correctly understood the law it was applying:

> The ALJ *imputed* Jacobs' actual knowledge of the violation to JCI. . . . The ALJ also . . . held that [Petitioner] '*through Cox and Jacobs*, was actually aware, at the time of the violative act, that the act was unlawful.'
>
> . . . .
>
> [T]he decision is in accordance with the law.

Pet. App. 4, 5 (emphasis added).

The Secretary asserts that "it is possible" the Eleventh Circuit rested its opinion on either the Secretary's forfeiture argument or its harmless error argument. Res. 16-17. But the parties expressly argued both points in the Eleventh Circuit, *see* Gov't C.A. Br. 33-39, 45-47; Pet. C.A. Reply 3-7, 13-15, and the Eleventh Circuit mentioned neither. Rather, the

Eleventh Circuit approved the ALJ's legal analysis and in doing so adopted the minority rule of law.

D. The ALJ's analysis violates Congressional intent and is unreasonable and incorrect.

The Secretary's final argument, like the decisions of the ALJ and the Eleventh Circuit, is in conflict with Congressional intent. Contrary to the Secretary's characterization, the question on review is *not* "which of petitioner's agents are sufficiently identified with petitioner such that their actions and knowledge are properly attributable to the corporation." Res. 19. Rather, the important issue on review is whether the conduct of the employer's supervisors was sufficiently foreseeable under the Act to support a finding that the employer *knowingly* violated an OSHA standard. The Secretary argues that the employees' status as supervisors, *standing alone*, justifies attributing their knowledge to the employer. The fundamental flaw in that position – which is the minority view – is that it is rooted in general principles under agency common law rather than the Act's fault-based requirement of foreseeability.[5] Pet. 14.

The rationale the Secretary offers for the minority rule cannot withstand scrutiny either. According

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[5] Evidently, in an effort to imply that Petitioner had knowledge, the Secretary repeatedly states that Petitioner's "top management" was aware that the gas line existed. Res. 4-5, 8, 11, 18-19. Yet, there is no evidence that Petitioner's management ever was made aware of the violation itself, or that it should have been.

to the Secretary, "holding employers responsible for the knowingly wrongful acts of their supervisory employees . . . would actually provide the appropriate incentives to hire supervisors who will not engage in knowing misconduct in the first place." Res. 20. The facts of this case belie the Secretary's claim. The supervisors in this case were experienced trench workers who had spotless safety records. *See* Pet. C.A. Br. 14-15. Imputing knowledge of their willful misconduct to Petitioner without determining that their actions were foreseeable will not encourage employers to exercise more caution. Instead, it will communicate to them that corporate care and prudence do not matter.

CONCLUSION

The issue on review is of great importance. The Court should grant Certiorari and resolve the split in the circuits.

Respectfully submitted,

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